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April 29, 1994

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Cablevision Systems Corporation Ex Parte Letter on Bell Atlantic Objection to Processing Broadband PCS Applications
Gen. Docket No. 90-314, ET Docket 93-266

Dear Mr. Caton:

On behalf of Cox Enterprises, Inc. ("Cox"), this will respond to the letter of April 19, 1994, submitted in the above-captioned proceeding by Cablevision Systems Corporation ("Cablevision"). In its letter, Cablevision aligns itself with the March 16, 1994, comments of Bell Atlantic Personal Communications Inc. objecting to the Commission's February 25, 1994, Public Notice that invited the three companies awarded broadband PCS pioneer's preferences (Cox, American Personal Communications and Omnipoint Communications) to file applications and specified the requirements for such filings.[1/] In addition, Cablevision argues that the February Notice was "fatally defective" for failure to specify an application requirement of a "detailed showing" of substantial use of the design and technologies upon which the preference was based.[2/]

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1/ Public Notice, "Commission Invites Filing of Broadband Personal Communications Service Pioneer's Preference Application," (released February 25, 1994) ("February Notice"). See Third Report and Order, Gen. Docket No. 90-314, FCC 93-550 (released February 3, 1994) ("Third Report"). Cox responded to the Bell Atlantic letter on March 31, 1994.

2/ Cablevision seeks to have the Commission issue a clarifying Public Notice directing preference holders to submit "a detailed and complete showing" of compliance with the Commission's policy.

Cablevision's letter is nothing more than a transparent attempt to interject irrelevant issues to delay the processing and grant of PCS preference licenses. The letter contains nothing to warrant the deferral of the filing, acceptance and processing of pioneer's preference applications. It only highlights the need for the Commission to process the preference applications expeditiously by placing them on Public Notice.

1. Cablevision's Request Is Procedurally Improper

Cablevision argues that the February Notice should be reissued to explicitly require preference holders to submit a "showing" of the consistency of the preference applications with the Commission's requirement articulated in the Third Report and Order to implement the system design or technology upon which the preference was based. A new public notice would be superfluous since the Commission would merely reiterate what it has already adopted as a matter of policy. More importantly, however, a public notice imposing a "detailed and complete" showing of compliance would countenance Cablevision's attempt to have the Commission interpret its policies in a manner Cox believes is inconsistent with the Commission's purposes. The time, however, to address these matters is in the petition process once the applications appear on Public Notice.

In addition, Cablevision attempts to cloak its substantive objection to the preference applications as a procedural defect. Indeed, Cablevision characterizes the preference applications already filed as "uneven at best" in meeting Cablevision's own interpretation of the Commission's requirements of a preference application. This argument is premature, however, since the Commission has not yet invited petitions to deny the preference applications by issuing a Public Notice. Cablevision apparently is seeking to take the first of what would appear to be several "bites at the apple" to raise objections to the preference applications.[3/] If it can establish standing, Cablevision will have ample opportunity to object to the preference applications as they are processed. Raising a substantive objection to the applications before they are made available to the public by their placement on Public Notice is simply improper as well as unfair to the preference applicants.

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3/ It is no secret that Cablevision is bitterly disappointed by the Commission's decision not to award it a preference for its PCS activities. Cablevision has already filed for court review of the Commission's decision (See Petition for Review, Case No. 94-1280 filed in the U.S. Court of Appeals for the District of Columbia on March 30, 1994) and has repeatedly filed material disparging Cox's PCS developmental efforts. The merits of Cablevision's arguments have consistently been rejected by the Commission. It is unfortunate and a drain on Commission resources, however, that Cablevision cannot proceed within the proper procedural framework to make its objections to the preference applications known.

2. The Pendency of Petitions for Reconsideration Does Not Preclude Pioneer's Preference Holders' Applications

Ignoring Congress' express direction that the Commission act promptly to implement PCS,[4/] Cablevision argues that the PCS application process cannot begin until all rules are final and no longer subject to reconsideration. The only support Cablevision can muster for its extraordinary argument is that petitions for reconsideration filed in the PCS rulemaking may result in changes to the FCC's "standards for processing applications."[5/]

Cablevision's argument has no basis in either law or policy and only serves to advance Cablevision's dilatory purpose. The Commission's February Notice specifically recognized that aspects of its PCS rules are under consideration in PP Docket No. 93-253, and stated that if the rules adopted therein "...require different fees or application forms than those filed, these applicants may be required to amend the applications accordingly." The Commission plainly has already addressed and resolved the issue that Cablevision seeks to transform into an insurmountable obstacle to the mere filing of applications.

It also is nonsense for Cablevision to claim that processing preference applications now will cause petitioners to lack "critical parameters" for their filings. The Commission repeatedly has indicated that PCS pioneer's preference applications and authorizations would be subject to modification if required by subsequent rule changes.[6/] Presumably, if any rule changes trigger major modifications, parties would be provided an opportunity to supplement previously filed petitions to address any new issues raised by modifications. It is mere speculation, however, to assume that major modifications will be necessary.

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4/ Section 6002(d)(2) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, 107 Stat. 379, 396-397 (1993) requires the Commission to commence issuing PCS licenses and permits by May 7, 1994.

5/ Cablevision's observation is not based on any reasonable review of the petitions for reconsideration. Virtually every petition for reconsideration addressed either technology, operational or PCS spectrum and allocation issues. The "standards for processing applications" simply is not a major issue on reconsideration and cannot form the basis of a serious objection to processing the preference applications.

6/ See February Notice and Third Report, supra, at par. 2.

3. Conclusion

Congress repeatedly has emphasized its strong interest in the development and implementation of new technologies in general[7/] and PCS in particular.[8/] Because it failed to demonstrate its qualifications for a pioneer's preference for PCS, Cablevision is now grasping for any means to thwart the implementation of PCS service by preference applicants. The contrived arguments of its April 19, 1994, letter afford no basis for delaying the public benefits of new services and technologies embodied in the PCS pioneer's preference applications.

The Commission has broad authority to adopt procedures which it determines will serve the public interest.[9/] The February Notice represents a reasonable exercise of the Commission's administrative discretion. Cablevision submits nothing to warrant the deferral of the filing, acceptance and processing of pioneer's preference applications or the issuance of a "clarifying" Public Notice. Its request for these actions must be denied.

Respectfully submitted,

Werner K. Hartenberger
Laura H. Phillips

Counsel for Cox Enterprises, Inc.

cc: Commissioner James H. Quello
Commissioner Andrew C. Barrett
Steven Markendorff
Geraldine Matise, Esquire
GEN Dkt. No. 90-314, ET 93-266 Service list

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7/ See, e.g., 47 U.S.C. § 157.

8/ See n. 4, supra.

9/ It is well established that administrative agencies are masters of their own houses and are free to fashion procedures optimally conducive to implementing their statutory mandates. See, e.g., Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Companies, 111 S. Ct. 615 (1991); FCC v. Schreiber, 381 U.S. 279 (1965); Amcor, Inc. v. Brock, 780 F.2d 897 (11th Cir. 1986); Katzson Bros., Inc. v. United States, 839 F.2d 1396 (10th Cir. 1988); Frazier v. Merit System Protection Board, 672 F.2d 150 (D.C. Cir. 1982); Seacoast Anti-Pollution League v. Costle, 597 F.2d 306 (1st Cir. 1979); Natural Resources Defense Council v. SEC, 606 F.2d 1031 (D.C. Cir. 1979).